STRATEGY RESEARCH PROJECT

THE OBLIGATION TO PROTECT HUMAN RIGHTS: A NEW LEGAL REQUIREMENT FOR COMMANDERS?

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ABSTRACT

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The court-martial of Captain Rockwood, which arose from an incident in Haiti during Operation Uphold Democracy, prompted human rights organizations, academics, and activists to argue that the U.S. forces had a legal obligation to monitor, investigate, and correct human rights violations they observed. The thesis of this paper is that U.S. forces were under no such legal requirement and that neither the law of armed conflict nor human rights law was applicable to the operation. Human rights norms should be considered by planners and commanders as they prepare for and conduct peace operations, but the only legal "humanitarian" obligation imposed on the deployed U.S. forces was the Uniform Code of Military Justice. Adherence to the UCMJ will result in civilians being treated humanely, which, in effect, protects their basic human rights.

The Obligation to Protect Human Rights: A New Legal Requirement for Commanders?

INTRODUCTION

Since the end of the Cold War the U.S. military has conducted an increasing number of military operations which are not, for purposes of legal analysis, within the commonly-recognized category of international armed conflicts. Joint Staff and Army publications detail the complexity and diversity of these operations.[1] This paper deals with those which fall within the category of "peace operations."[2] The wide variety of these "new" operations has led to a thorough and dramatic review of operational doctrine.[3] Surprisingly, however, there has not been a concomitant and equally thorough review of the law applicable to them.[4] That legal analysis which has occurred has started with the premise that international humanitarian law must apply to peace operations.[5] This paper examines international human rights law, which some contend may be applicable to these operations, and assesses the potential impact this body of law may have on deployed U.S. forces. The subject poses an interesting issue for commanders and soldiers: Are U.S. forces <u>legally obligated</u> to adhere to international human rights laws and to enforce them during peace operations? The thesis of this paper is they are not. Although operational planners and commanders should consider human rights when preparing and conducting peace operations, and must prepare to use agencies,

such as nongovernmental organizations (NGOs), to redress any human rights abuses, they are under no legal obligation to monitor, investigate, or correct human rights abuses other than those committed by members of their units.

THE FACTS

An incident in Haiti during Operation Uphold Democracy[6] which involved Captain Lawrence Rockwood, a counter intelligence officer who deployed with the U.S. forces, prompted this examination. Operation Uphold Democracy began on 19 September 1994 with the deployment of a multinational force (MNF) led by the U.S. 10th Mountain Division (LI).

> On 30 September 1994, Captain Rockwood, an officer assigned to the 10th Mountain Division (LI) failed to report for duty in the Joint Operation Support Element (JOSE) as the night watch officer. Instead CPT Rockwood departed the secured U.S. compound (Light Industrial Complex) in full uniform, with flak vest and helmet and a loaded M16 contrary to established orders. After flagging down a Haitian pick-up truck, CPT Rockwood arrived at the Port-au-Prince National Penitentiary at about 1900-2100 hours and demanded entry to conduct a personal inspection. American authorities at the U.S. Embassy were contacted by the prison commander. A U.S. Embassy representative...who was not associated with the Multinational Forces (MNF), arrived at the prison and after some effort was able to convince CPT Rockwood to clear his weapon and relinquish his ammunition. He subsequently surrendered this weapon after returning to the U.S. Embassy and thereafter returned to the U.S. Compound.[7]

During his Congressional statement,[8] Captain Rockwood indicated his motivation for inspecting the penitentiary evolved as follows. He knew that "the primary objective of the operation Uphold Democracy was 'to prevent the brutal atrocities against Haitians'" as announced by President Clinton on September 15,

1994.[9] He arrived in Port-au-Prince on September 23, 1994 assuming "that the inspection of prisons would be a priority for the" MNF.[10] He "approached the command chaplain, [the] legal section, the civil military operation center, the military police, the special operations liaison officer, the U.N. military observers, and senior officers on [the] operation staff" about the human rights issues, but was met by "an inexplicable indifference toward human rights violations."[11] On September 30, he filed a complaint with "the Inspector General of the 10th Mountain Division."[12] After being told that his complaint would not be brought to the attention of the Division Commander "for a week," Captain Rockwood "left the military compound to inspect the major prison in Port-au-Prince."[13] He "spent 2 hours there," "found atrocious conditions and shockingly emaciated inmates," and was ultimately "taken to the military compound" by a "military officer from the U.S. Embassy."[14]

Captain Rockwood was court-martialed for his actions, including leaving his place of duty, disrespect to a superior officer, disobedience to orders, and conduct unbecoming an officer. He was found guilty of several offenses and sentenced to dismissal from the service. His lengthy and complex trial involved extensive opinion testimony on the applicability of various international legal norms to the activities of the U.S. forces deployed on Operation Uphold Democracy as well as his own legal and moral obligations as a member of that force. Captain Rockwood's case is pending appeal.

THE ISSUES

The Congressional hearing established that there were human rights violations being committed in the Port-au-Prince National Penitentiary.[15] Even though that allegation by Captain Rockwood was true, were the U.S. forces legally obligated to investigate the abuses and take remedial action?

Captain Rockwood's case clearly focused the issue and became a cause celebre for human rights organizations, activists, and academics. For example, the Lawyers Committee for Human Rights (hereinafter Lawyers Committee) wrote a monograph about the case[16] which contended that "[h]uman rights law applies to any U.S. military mission abroad"[17] and that "[u]nder international law recognized and binding on the U.S., Captain Lawrence Rockwood had a right and a duty to act where no other U.S. official would."[18] The Lawyers Committee also asserted that "[u]nder relevant legal standards, U.S. commanders would bear responsibility -- even individual responsibility -- for failing to take steps to end a pattern of serious abuses by personnel under their authority" which, the Lawyers Committee argued, because of the nature of the operation, included the Haitian military and security forces.[19] The monograph concluded by ominously referencing the Nuremberg Tribunal and the conviction and execution of the World War II commander of Japanese troops in the Philippines, General Yamashita.

Amnesty International (AI), the renowned human rights organization, is also interested in U.S. military peace

operations. The clearest indication of this interest is Appendix VIII of Amnesty International USA's 1995 Report.[20] That Appendix,[21] entitled "Amnesty International's 15-Point Program for Implementing Human Rights in International Peace-keeping Operations," contains a "set of recommendations...aimed at the incorporation into all peace-keeping and other relevant field operations of essential measures to ensure respect for human rights as well as monitoring, investigation and corrective action in respect of violations" (emphasis added).[22] AI urges all United Nations member states "to pay greater attention to the importance of addressing human rights in a serious way in the planning and implementation of all peace-keeping operations."[23] As further indication of the intensity of its interest, AI would probably have declared Captain Rockwood a "Prisoner of Conscience" had he been sentenced to imprisonment, bringing upon the Department of Defense (DoD) all the attendant political pressure such a designation entails.[24]

A final example of the interest of human rights activists is an article by Theodor Meron, a noted human rights scholar, on the applicability of human rights norms to Operation Uphold Democracy.[25] The article discusses the impact of the International Covenant on Civil and Political Rights (Covenant)[26] and concludes that "[b]ecause it holds effective power in Haiti, the United States must respect its obligations under the Covenant."[27] Professor Meron's argument concerning the extent of U.S. control in Haiti is similar to that posited by the

Committee.[28]

Are these attempts to impose human rights obligations on deployed U.S. forces simply intellectual exercises or do they have practical impact? Clearly they are not purely academic. If the human rights activists are correct, commanders at the tactical level would have to include in their plans the capability to monitor, investigate, and correct human rights abuses. Requiring commanders to employ their usually limited forces in accomplishing this additional mission could have a detrimental impact on force protection especially during the initial stages of an operation. If, as human rights groups assert, the agreement signed prior to Operation Uphold Democracy by former President Carter and Emile Jonassaint, the military-appointed President of Haiti,[29] obligated the MNF to enforce human rights norms during that operation, then does the Dayton Accord impose the same requirement on the Implementation Force (IFOR) in Bosnia? If so, the impact on strategic-level decision makers is significant and could change the mission of Operation Joint Endeavor. For example, if the IFOR is required under international law to ensure Bosnian Muslims' human rights are protected, the Secretary of Defense and the Commander of NATO forces in Bosnia could be accused of violating international law when they declared the IFOR would not act as a police force.[30] The obligation imposed by international human rights law would build "mission creep" into the operation. This additional requirement could have been a decisive factor leading to a

decision not to participate in the operation. Fortunately, neither the law of armed conflict nor human rights law requires U.S. forces to assume the burden of human rights enforcement during deployments such as Operations Uphold Democracy and Joint Endeavor.

THE LAW OF ARMED CONFLICT

The law of armed conflict (LOAC) has recently received significant attention as historic milestones in its development have been commemorated. In 1993, the 25th anniversary of the incident at My Lai was observed[31] and 1995 was the 50th anniversary of the Nuremberg Tribunal. There is no doubt about the dedication of the U.S. armed forces to the LOAC as exemplified by the strict compliance of those forces to its principles during Operation Desert Storm, an international armed conflict. In fact, the Department of Defense (DoD) has made the policy decision that the U.S. armed forces will apply LOAC standards "however such conflicts are characterized."[32] However, despite DoD policy, it must be remembered that the LOAC does not legally apply to every deployment of U.S. forces. The Rockwood case has generated considerable examination of LOAC principles and therefore provides an excellent vehicle for reviewing LOAC limitations.[33]

The history of the LOAC is well known.[34] Its cornerstones are two basic documents - the Hague Regulations of 1907[35] and the Geneva Conventions of 1949.[36] The former deal primarily with the

means and methods of warfare while the latter are intended to protect noncombatants. The Geneva Conventions provide "human rights" norms to protect soldiers when they become noncombatants and to protect civilians caught up in armed conflict. There are other LOAC documents, particularly the two 1977 Protocols to the Geneva Conventions of 1949,[37] but because they are not binding on the U.S. and the vast majority of their provisions do not reflect customary international law, they do not apply to this discussion of Operation Uphold Democracy.

In recognition of state sovereignty, the drafters of the Geneva Conventions tightly focused them (with the exception of one article) exclusively on international armed conflicts. This focus is reflected in Article 2, common to all four of the conventions, which states in pertinent part:

> [T]he present Convention shall apply to any other armed conflict which may arise between two or more of the High Contracting Parties.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[38]

As indicated above, there is one article common to the four conventions, Article 3, which applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[39] This single article brings international regulation to the internal affairs of states and is the only such provision in the conventions. As a result of this careful drafting, the vast majority of the provisions of the

Geneva Conventions apply only to international armed conflicts. The Hague Regulations and Protocol I have similar coverage. Common Article 3 and Protocol II only apply to intrastate armed conflicts.

In spite of this obvious limitation, the Lawyers Committee has attempted to stretch the applicability of the LOAC to cover Operation Uphold Democracy by stating:

> Humanitarian law is traditionally understood to require an armed conflict before its detailed rules are, strictly speaking, applicable. However, there is growing support for the view that even without separate warring sides, violence in a contested political situation may trigger customary humanitarian law governing non-international armed conflicts. Haiti's situation is an interesting case in point. It includes an ongoing conflict over State authority in which the violence, though almost exclusively one-sided, was sufficient for the UN to characterize it as a threat to regional peace and security. The role of the MNF, as a UN proxy, "internationalized" the conflict and finds its closest analogy in the Geneva Convention's "Protecting Power" who, though not a belligerent is designated to monitor the compliance by the parties to the conflict. Therefore, humanitarian law provides a highly relevant framework for non-combat operations such as the MNF's in Haiti.[40]

In this apparently desperate effort to apply the LOAC to a non-conflict situation, the Lawyers Committee inappropriately raised the concept of Protecting Powers, which is applicable only to international armed conflicts; then it erroneously asserted that the Geneva Conventions apply; and finally, it concluded, based on these false premises, that as a result of the applicability of the Geneva Conventions, the U.S. forces had the legal obligation to investigate and remedy the "grave breaches" occurring in the National Penitentiary.[41]

There is absolutely no support in the LOAC for this extraordinary conclusion. The purpose of Protecting Powers is clearly stated in an article common to the four conventions.[42] This article indicates that "[t]he present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the Parties to the conflict" (emphasis added).[43] Operation Uphold Democracy was not an armed conflict, either international or internal. Additionally, the grave breaches provision only applies to "persons...protected by the present Convention."[44] Because there was no conflict associated with Operation Uphold Democracy, Haitian nationals were not "protected persons."[45] Finally, as indicated in the commentary to the Geneva Conventions:

> A Protecting Power is, of course, a State instructed by another Sate (known as the Power of Origin) to safeguard its interests and those of its nationals in relation to a third State (known as the State of Residence). It will be seen that the activities of a Protecting Power are dependent upon two agreements: the first between the Power of origin and the Protecting Power and the second between the Protecting Power and the State of Residence.[46]

The U.S. was not a Protecting Power.

There has been some discussion regarding the issue of whether the U.S. forces were actually an occupying power in Haiti, thereby bringing the provisions of the fourth Geneva Convention regarding occupation into effect.[47] This question is also answered rather easily. Article 42 of the Hague Regulations indicates that "[t]erritory is considered occupied when it is actually placed under the authority of a hostile army" (emphasis added). Occupation has also been described as follows:

> Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.[48]

Operation Uphold Democracy did not involve either a "hostile army" or a "hostile invasion," and the U.S. neither "rendered the invaded government incapable of publicly exercising its authority" nor "substituted its own authority for that of the legitimate government" in Haiti. The U.S. forces did not occupy Haiti.

Had the U.S. forces actually invaded Haiti and engaged in combat with the Haitian military, it is clear that the LOAC would have applied to what would have been an international armed conflict. The U.S. government recognized this fact when it informed the ICRC that:

> If it becomes necessary to use force and engage in hostilities, the United States will, upon any engagement of forces, apply all of the provisions of the Geneva Conventions and the customary international law dealing with armed conflict.
>
> Further, the United States will accord prisoner of war treatment to any detained member of the Haitian armed forces.[49]

The U.S. forces, however, conducted a permissive entry into Haiti pursuant to the agreement between former President Carter and Emile Jonassaint. Professor Meron, in his article, refers to this "consent-based, nonviolent, hostilities-free entry of U.S. forces and their peaceful deployment," and concedes that "[i]n

such circumstances, the Geneva Conventions on the Protection of Victims of War of August 12, 1949, are not, strictly speaking, applicable (emphasis added)."[50] The interjection "strictly speaking" is superfluous. The LOAC did not apply to Operation Uphold Democracy. The various assertions by Captain Rockwood and the human rights activists regarding the applicability of the principles of the Nuremberg Tribunal, the Yamashita case, command responsibility, and other traditional aspects of the LOAC are misplaced.

Since the LOAC did not apply to Operation Uphold Democracy, did international human rights law operate to fill this legal vacuum?

HUMAN RIGHTS LAW

Human rights considerations play a valid role in all operations undertaken by the U.S. government, because a violation of human rights by U.S. forces can effect mission accomplishment as severely as a violation of the LOAC.

An excellent example of this effect is the massacre at My Lai in 1968.[51] The impact of this incident on the U.S. effort in Viet Nam is well documented. A unique argument has been made that the massacre at My Lai was not a violation of the LOAC because the victims were not "protected persons" under the Geneva Conventions.[52] Regardless of the validity of that argument, however, the key point is that the U.S. forces should have respected the human rights of the victims and their failure to do

so had a significant negative impact on the U.S. effort in Viet Nam. An important aspect of the massacre is that the perpetrators were not charged with committing war crimes or violating the human rights of the victims. They were charged with murder under the provisions of the Uniform Code of Military Justice (UCMJ).[53] This illustrates the fact that even if the LOAC, human rights law, or even domestic U.S. federal law are not applicable to a given situation, the UCMJ always regulates the conduct of U.S. military personnel deployed overseas.

Other incidents indicate the potential impact allegations of human rights violations can have on U.S. government activities and policy. The first example involves an AI report issued in 1994 about the violence in Colombia.[54] The report's Introduction summarizes the violence and human rights violations in Colombia. It contains the statement that "Colombia's backers, notably the United States of America, have also remained silent when aid destined to combat drug-trafficking was diverted to finance counter-insurgency operations and thence the killing of unarmed peasants."[55] This allegation was presented by AI at a press conference, which also included the following statement from their Executive Director:

> There is now good reason to believe the United States has been a collaborator in the charade that much of the U.S. aid intended for counternarcotics operations has in fact been diverted to the killing fields.[56]

The allegation resulted in criticism of the U.S. government's counterdrug and security assistance policies and prompted an extensive internal review of those programs. Because that review

established no U.S. collaboration in or condonation of human rights violations, the allegation's effect on the U.S. security assistance program in Colombia and the counterdrug effort was minimal. However, the potential impact of a substantiated allegation is obvious.

An allegation of human rights violations that recently caused significant problems for a U.S. government agency was contained in a March 22, 1995 letter from Congressman Torricelli to President Clinton.[57] The Congressman claimed that the Central Intelligence Agency (CIA), through one of its operatives, Julio Roberto Alpirez, a Colonel in the Guatemalan army, was directly involved in the murders in Guatemala of an American citizen, Michael Devine, and a Guatemalan insurgent, Efrain Bamaca Velasquez, that took place in 1990 and 1992 respectively.[58] The Congressman simultaneously released his letter to the New York Times. The allegation caused an extensive review of U.S. government policies and activities, including those of DoD, in Central America for the last two decades. The CIA conducted a vast internal investigation that resulted in criticism of prior policies and practices, new procedures, and disciplinary action against several employees, and contributed to the appointment of a new Director of Central Intelligence.[59]

Clearly, DoD civilian and military leaders have to be sensitive to human rights issues. That does not mean, however, that U.S. armed forces are <u>legally bound</u> as proposed by AI to incorporate procedures for monitoring, investigating, and

correcting human rights abuses into their many, varied activities. The Lawyers Committee and Professor Meron, however, support AI's view, and have also argued for this obligation. Both base their arguments on the International Covenant on Civil and Political Rights and in particular, its language in Article 2(1), which states in pertinent part:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind (emphasis added).

The Lawyers Committee contends that "the U.S. expressly assumed a responsibility for functions of state through an accord negotiated by former President Jimmy Carter with the Haitian military regime prior to the MNF landing."[60] The monograph then indicates that "[t]he Haitian military and police, according to the text, agreed to 'work in close cooperation with the U.S. Military Mission...during the transitional period required for insuring (sic) the vital institutions of the country'."[61] Contrary to this assertion by the Committee, the quoted provision clearly indicates that the "Haitian military and police" were functioning organizations and that the U.S. forces were to work with them. The language does not in any way either establish U.S. jurisdiction in Haiti or create a U.S. responsibility for the governance of the country.

On the other hand, Professor Meron spends a considerable amount of time establishing that which is obvious from the plain language of the Covenant -- that the Covenant applies both within

the territory of a state and within territory outside of the state which is "subject to its jurisdiction."[62] He correctly cites the Iragi occupation of Kuwait in 1990 as an instance when the Covenant applied because the Kuwaiti citizens were subject to the jurisdiction of Iraq as an occupying power.[63] It must be noted that the Iraqi occupation of Kuwait is completely dissimilar from Operation Uphold Democracy. Professor Meron then contends that "[w]here agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside the national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues."[64] He concludes with the statement that "[b]ecause it holds effective power in Haiti, the United States must respect its obligations under the Covenant."[65]

Professor Meron ignores the basic concept of state sovereignty. A state may only exercise jurisdiction in another state under extremely limited circumstances. One such instance is occupation, which has already been discussed and is inapplicable to Operation Uphold Democracy. Another circumstance is pursuant to an international agreement in which the host state consents to the other state exercising jurisdiction within its territory. Examples of these types of agreements are those regulating the status of foreign forces in states. Mere acquiescence is insufficient. The host state must indicate its consent by an affirmative act. The agreement between former President Carter and Emile Jonassaint contained no such

affirmative indication of consent. In fact, the provision discussing "close cooperation" between the U.S. military and the "Haitian military and police" recognizes the jurisdiction of those Haitian institutions. The U.S. forces were only to assist in maintaining order and public safety. The military government exercised jurisdiction in Haiti until the arrival of President Aristide at which point jurisdiction passed to the civilian government.

While the level of governance in the country was obviously quite low, that fact alone does not justify the assumption of jurisdiction over the sovereign state of Haiti by the U.S. forces. There is no legal basis for the U.S. forces to exercise jurisdiction in Haiti. Under those circumstances, the Covenant was not applicable to the actions of the U.S. forces and they were under no legal obligation to monitor, investigate, or correct human rights abuses.

CIVILIAN PROTECTION LAW

Since neither LOAC nor human rights law applied to Operation Uphold Democracy, the legal void continues. Like nature, however, international lawyers abhor a vacuum. Can it be that no international law regulates a deployment such as Operation Uphold Democracy? Where can Commanders and Judge Advocates turn for guidance? The lawyers at the Army Judge Advocate General's School have attempted to fill the void. Their concept is "Civilian Protection Law" (CPL).[66]

The development of CPL is based on two premises. The first is that "[t]he law of war, having evolved to regulate traditional forms of hostilities, failed to provide an adequate source of law relative to the many 'nuanced' operations of the past decade."[67] The second recognizes "the tendency of the law to lag behind operational realities" and is that "military leaders must have a practical set of rules that is both accepted and respected by the international community, and makes sense to both our national leadership and the American people."[68] The section introducing CPL clearly indicates the intent of the drafters - "These rules are necessary, not primarily to curb or control the conduct of our forces, but to provide guidance and direction in situations that frequently seem without structure."[69] Contrary to their assertion, however, there are already sufficient "rules" regulating the conduct of deployed U.S. forces.

The CPL model envisions a four-tiered approach depending on the nature of the deployment. The first tier contains protections to which "[a]ll civilians, regardless of their status, are entitled."[70] The model then lists some of the first-tier protections as:

> [T]he right to a fair and regular trial, the right to be cared for when sick, the right to humane treatment, freedom from torture and cruel or degrading treatment, freedom from physical violence, freedom from arbitrary arrest and detention, and the right to be properly fed and cared for when detained or under the protection of a national power.[71]

Several sources for these protections are cited, including the "Universal Declaration of Human Rights, numerous human rights

treaties, the Charter of the United Nations, and the third common article to the four Geneva Conventions of 1949."[72]

If these protections apply to all civilians encountered by U.S. forces deployed on various operations, are those forces then required to monitor, investigate, and correct violations? When concentrating on mission accomplishment and force protection, U.S. forces have neither the time, resources, or capability to ensure these protections for all civilians in a nation such as Somalia. If that is what CPL envisions, it is obviously wrong and must be revised. International law places no such requirement on deployed U.S. forces.

The "[s]econd tier protections include any protections afforded by host nation law that remains in effect after the entry of US forces."[73] This tier states the generally accepted principle that U.S. forces are required to observe host nation law. The requirement to observe the law, however, does not include a requirement to enforce it. U.S. forces deployed on a peace operation such as Operation Uphold Democracy are not required to become a nation's police force.

The third tier includes protections such as "political asylum, temporary refuge, and the rights conferred on refugees" as well as the traditional LOAC protections.[74] The fourth tier includes protections that accompany a belligerent occupation.[75] These final two tiers not objectionable as long as the limitations on the various legal requirements, some of which have been discussed above, are remembered.

While the concept of CPL does provide some structure for analysis and is a laudable effort to fill the void (assuming of course that the void needs to be filled), the armed forces of the United States are already bound by a law protecting civilians whenever they deploy on peace operation. It is the Uniform Code of Military Justice. Requiring the compliance of members of the U.S. armed forces to the provisions of the UCMJ will ensure that all civilians encountered are treated humanely. As discussed above, more is not required of the U.S. forces on a deployment such as Operation Restore Democracy.

HUMAN RIGHTS AND DOD

While human rights law does not bind U.S. forces on deployments such as Operation Uphold Democracy, there is clearly a place for human rights considerations in the U.S. military's activities as it remains involved in helping implement the National Security Strategy of Engagement and Enlargement. The U.S. armed forces have a vital role to play in strengthening burgeoning democracies through combined exercises, military-to-military contacts, such as the Partnership for Peace, and other activities conducted with the militaries throughout the world. As U.S. forces meet with military personnel from other nations, they have an excellent opportunity to discuss and to demonstrate both the importance of adherence to human rights norms and the appropriate role of a military subordinate to civilian control in a democratic society.

A perfect example of this type of engagement is the Human Rights Program of the U.S. Southern Command. The CINC, U.S. Southern Command, emphasized the importance of the Program in a USSOUTHCOM policy memorandum[76] and has personally helped implement it. For example, he has directed that human rights issues be incorporated into combined exercises and that representatives from various human rights organizations be invited to observe and participate; he has emphasized the importance of civilian control of the military and respect for human rights in discussions with various Latin American civilian and military leaders; and he has delivered an address on human rights to the School of the Americas at Fort Benning, Georgia.[77]

The Human Rights Program applies to "all U.S. military personnel permanently or temporarily assigned to the USSOUTHCOM area of responsibility (AOR)," and has the following objectives:

> Establish a USSOUTHCOM human rights policy for the AOR consistent with U.S. law and policy and with international norms for human rights.
>
> Encourage allied governments and their agencies to adhere to international norms of human rights and assist them in doing so.
>
> Ensure that all U.S. military personnel assigned to USSOUTHCOM or deployed into the AOR receive human rights awareness training.
>
> Ensure that all U.S. military personnel assigned to USSOUTHCOM or deployed into the AOR understand their responsibility to immediately object to all suspected human rights abuses and report them, regardless of the identity of the victim or the perpetrator.
>
> Conduct or assist in investigations of all suspected human rights abuses.[78]

The memorandum also established a Human Rights Steering Group to monitor implementation of the Program.

As a result of the Human Rights Program, all U.S. forces deployed into the USSOUTHCOM AOR are to be aware of their obligations under the Program; they are to be cognizant of basic human rights norms through predeployment training; and they are to incorporate human rights training into their activities with allied military personnel. The program is having a positive impact on democratization throughout Latin America and could have similar effects worldwide.

This involvement in promoting human rights and the concept of subordination of the military to civilian control is a significant aspect of peacetime engagement that is particularly suited to being taught and demonstrated by U.S. military personnel.

CONCLUSION

Any obligations imposed on deployed U.S. forces by international law are of course primary and must be adhered to when they exist. There are, however, military operations to which international humanitarian law simply does not apply. When that occurs, the Uniform Code of Military Justice provides the law regulating the conduct of U.S. forces. Compliance with its provisions is the only legal requirement imposed upon their conduct during a mission such as Operation Uphold Democracy and it will ensure that civilians are treated humanely by U.S. forces.

The Armed Forces of the United States have a phenomenal capability to do good throughout the world, but can they "do it all"? Are they only required to provide a stable environment for a transition of power from an oppressive military regime to a duly-elected civilian government, or do they also have to run an entire country as result of the legal requirement asserted by Professor Meron, Amnesty International, and the Lawyers Committee? The U.S. forces have achieved significant humanitarian successes: the starving have been fed in places like Northern Iraq, Somalia, and Rwanda; the transition to a legitimate, civilian, duly-elected government in Haiti has been secured; and the killing has essentially stopped in Bosnia. They are also training allied military forces in adherence to basic human rights such as those found in common Article 3 of the Geneva Conventions and the proper role of the military in a democratic society. If U.S. forces are required to do more on deployments, such as act as an occupying force when not legally obligated to do so, they may be deployed less frequently, resulting in less assistance to needy people. Human rights activists must be satisfied by what the U.S. military is now accomplishing and avoid the strategic blunder of attempting to impose additional, usually unrealistic and unachieveable, requirements on it.

Captain Rockwood's actions the evening of September 30, 1994, have been labeled "Quixotic,"[79] and that description is apt. At no time was there a legal obligation on the commander of the U.S.

forces to monitor, investigate, or take corrective action regarding human rights abuses in Haiti. At most, the commander could have helped facilitate the activities of NGOs, such as the International Committee of the Red Cross, but any such assistance must be (and may legally be) a secondary consideration subordinate to the requirements of mission accomplishment and force protection.

The U.S. armed forces are renowned for their compliance with the requirement to conduct themselves professionally, while maintaining good order and discipline in their units and treating civilians they encounter with dignity and respect. Their conduct during Operation Uphold Democracy measured up to this high standard.

ENDNOTES

1. The two primary publications providing doctrine for U.S. military operations of the nature discussed in this paper are Joint Chiefs of Staff, Doctrine for Joint Operations, Joint Pub 3-0 (Washington: U.S. Department of Defense, 1 February 1995) (hereinafter Joint Pub 3-0) and Department of the Army, Peace Operations, Field Manual 100-23, (Washington: U.S. Department of the Army, December 1994) (hereinafter FM 100-23).

2. Joint Pub 3-0 and FM 100-23 both deal with this subject. At page GL-11, Joint Pub 3-0 defines the term "peace operations" as:

> The umbrella term encompassing peacekeeping, peace enforcement, and any other military, paramilitary, or nonmilitary action taken in support of a diplomatic peacemaking process.

At page 2, FM 100-23 indicates that "Peace operations encompass three types of activities: support to diplomacy, peacekeeping, and peace enforcement." The Field Manual refers to the United Nations Charter provisions which deal with "traditional peacekeeping" (Chapter VI) and "peace enforcement" (Chapter VII) and acknowledges the discrepancy between UN and Department of the Army definitions of the latter. While this imprecision may not be a major problem from a doctrinal standpoint, from a purely legal perspective, it ignores the distinction between those "peace enforcement" deployments to which the law of armed conflict (LOAC) is applicable and those to which it is not. For example, Operation Desert Storm was a peace enforcement operation during which the U.S. forces were obligated to comply with the LOAC. On the other hand, Operation Joint Endeavor is a peace enforcement operation in which they are not. A tangential purpose of this paper is to provide some clarity regarding the applicability of the LOAC to "peace operations."

3. See generally Joint Pub 3-0 and FM 100-23.

4. In fact, some of the legal comments associated with the subject have been less than helpful. Specifically, FM 100-23 contains the statements that "the laws of war...apply to US forces participating in the [peace] operation" (at 48), and that "[b]ecause of the special requirement in peace operations for legitimacy, care must be taken to scrupulously adhere to applicable rules of the law of war" (at 48). These two generalizations are wrong. As this paper will discuss, the law of war (referred to herein as the law of armed conflict) may be totally inapplicable to a particular peace operation.

5. See e.g., International and Operational Law Division, Operational Law Handbook (Charlottesvillle: The Judge Advocate General's School, United States Army, 1995), Chapter 13 (hereinafter OPLAW Handbook). This chapter is an effort to establish an approach for U.S. Judge Advocates to take when attempting to determine the applicable law to apply for the protection of civilians encountered during those "non-traditional" operations which are the subject of this paper. The efficacy of this recommended approach will be discussed later in the paper.

6. Operation Uphold Democracy was authorized by Security Council Resolution 940, adopted by the Security Council at its 3413th meeting, on 31 July 1994 (U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S.RES/940 (1994)). In pertinent part, the Resolution "authorize[d] Member States...to use all necessary means to facilitate the departure from Haiti of the military leadership..., the prompt return of the legitimately elected President..., and to establish and maintain a secure and stable environment." The Resolution is reprinted in Law and Military Operations in Haiti, 1994-1995: Lessons Learned for Judge Advocates, published by the Center for Law and Military Operations, The Judge Advocate General's School, United States Army, Charlottesville, Virginia, 11 December 1995, at page 177 (hereinafter Lessons Learned).

7. Major Richard Gordon, Deputy Staff Judge Advocate, 10th Mountain Division (LI) and Fort Drum, unclassified "Executive Summary" of the Captain Rockwood incident, Fort Drum, 5 February 1995.

8. Specifically, Captain Rockwood presented a written statement and testified before the Congress, House of Representatives, Committee on International Relations, Subcommittee on the Western Hemisphere, Human Rights Violations at the Port-au-Prince Penitentiary, 104th Cong., 1st sess., 3 May 1995 (hereinafter Rockwood Hearing).

9. Ibid., 22.

10. Ibid., 7.

11. Ibid.

12. Ibid.

13. Ibid.

14. Ibid.

15. See generally, the opening statement of Congressman Dan Burton, Chairman, Subcommittee on the Western Hemisphere, and the prepared statement and testimony of Paul J. Browne, Vice President, The Investigative Group, both at the Rockwood Hearing.

16. Lawyers Committee for Human Rights, Protect or Obey: The United States Army versus Captain Lawrence Rockwood, A report of the Latin America and Caribbean Program of the Lawyers Committee for Human Rights (New York: Lawyers Committee for Human Rights, May 1995)(hereinafter Monograph).

17. Ibid., 5.

18. Ibid., 11.

19. Ibid., 7.

20. Amnesty International, USA, Amnesty International Report, 1995 (London: Amnesty International Publications, 1995), covering the period January - December 1994.

21. Ibid., 346.

22. Ibid.

23. Ibid.

24. Mr. Morton E. Winston, Board of Directors, Amnesty International USA, discussion involving the author, 10 October 1995, New York.

25. Theodor Meron, "Extraterritoriality of Human Rights Treaties," The American Journal of International Law 89 (January 1995) 78-82 (hereinafter Meron). The author is a Professor of International Law at New York University.

26. International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, page 171 (entered into force for the United States on September 8, 1992)(hereinafter Covenant). The Covenant is reprinted in Richard B. Lillich and Frank C. Newman, International Human Rights: Problems of Law and Policy (Boston and Toronto: Little, Brown, and Company, 1979) 920.

27. Meron, 82.

28. Monograph, 6.

29. Lessons Learned, 182.

30. See e.g. John Pomfret, "Perry Says NATO Will Not Serve As 'Police Force' in Bosnia Mission," The Washington Post, 4 January 1996, sec. A, p. 18; and John Pomfret, "U.S. Commander Optimistic on Bosnia Deployment: Smith Cites Military Progress, Lays Out Clear Limits on Tasks for American Troops," The Washington Post, 29 December 1995, sec. A, p. 26.

31. See e.g. Jeffrey A. Addicott and William A. Hudson, "The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons," Military Law Review, vol. 139 (1993): 153 (hereinafter Addicott and Hudson). This article contains an excellent discussion of the My Lai massacre, including the facts of the incident, its causes, and the lessons to be learned from it.

32. Department of Defense, DoD Law of War Program, DoD Directive 5100.77 (Washington: U.S. Department of Defense, 10 July 1979), 2. A question arises as to whether this provision mandates the application of the LOAC, including those regulations pertaining to belligerent occupation to a military operation such as Operation Uphold Democracy. While the exact meaning and impact of the policy may be open to debate, it seems clear that a prerequisite for its applicability is the involvement of the U.S. armed forces in a "conflict" as that term is traditionally understood under the LOAC. Operation Uphold Democracy was not such a "conflict" and neither were the vast majority of the other "peacetime operations" in which the U.S. military has become involved in the last few years.

33. See e.g. Edward J. O'Brien, "The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood," pending publication in Military Law Review, no. 149, by the Judge Advocate General's School, United States Army. See also, the testimony and statement of Colonel Richard H. Black, U.S. Army (Ret.) at the Rockwood Hearing, pps. 8 and 27. The article, testimony, and statement, contain accurate discussions of the Nuremberg Tribunal, the Yamashita case, command responsibility, illegal orders, My Lai, and other traditional aspects of LOAC. The difficulty of this approach is that it attempts to apply these LOAC principles to Operation Uphold Democracy which was not an international armed conflict.

34. For an excellent, brief summary of the LOAC, see the book review by Keith D. Barber, "No Fire This Time: False Accusations of American War Crimes in the Persian Gulf," 146 Military Law Review, no. 146 (1994): 235.

35. Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, reprinted in Department of the Army, Treaties Governing Land Warfare, DA Pamphlet 27-1 (Washington: Department of the Army, December 1956), 5.

36. The four Geneva Conventions of 1949 are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done Aug. 12, 1949, 6 U.S.T. 3115, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (hereinafter GWS); the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done Aug. 12, 1949, 6 U.S.T. 3219, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (hereinafter GWS(Sea)); the Geneva Convention Relative to the Treatment of Prisoners of War, done Aug. 12, 1949, 6 U.S.T. 3317, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (hereinafter GPW); and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, done Aug. 12, 1949, 6 U.S.T. 3517, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (hereinafter GC), reprinted in Department of the Army, Treaties Governing Land Warfare, DA Pamphlet 27-1 (Washington: Department of the Army, December 1956).

37. The two 1977 Protocols are the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), both of which are reprinted in Department of the Army, Protocols to the Geneva Conventions of 12 August 1949, DA Pamphlet 27-1-1 (Washington: U.S. Department of the Army, September 1979). The Protocols were sponsored by the International Committee of the Red Cross (ICRC) which, since 1977, has been doggedly attempting to convince the international community that the Protocols have relevance and in fact improve the LOAC. The ICRC is wrong. Protocol I's expression of applicability in Article 1(4) to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination" preordained its irrelevancy and essentially resulted in it being stillborn. The ICRC's current effort to convince the community that the Protocols are customary international law is also misguided. While some of their provisions may be customary international law, the vast majority of them are not and, based on the community's overall reaction to the Protocols, they will probably never become customary international law.

38. At first glance, it would appear that Operation Uphold Democracy was a "partial or total occupation" thereby rendering the Geneva Conventions applicable to the actions of the U.S. forces. As will be discussed below, the MNF did not occupy Haiti.

39. The essence of common Article 3 is that it requires humane treatment of noncombatants. Specifically, it prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture." Additionally, "taking

of hostages," "humiliating and degrading treatment," and "the passing of sentences and the carrying out of executions" without due process of law are also condemned.

40. Monograph, 5.

41. "Grave breaches" are described in articles that are basically the same in each of the conventions (Article 50 (GWS), Article 51 (GWS(Sea)), Article 130 (GPW), and Article 147 (GC)). Grave breaches include "the following acts, if committed against persons...protected by the present Convention: wilful killing, torture or inhumane treatment,...wilfully causing great suffering or serious injury to body or health,...unlawful confinement of a protected person,...willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention" (GC, Article 147)(emphasis added).

42. The provision stating the purpose of the Protecting Powers is found in Article 9 of the GC and in Article 8 of the other three conventions.

43. Ibid.

44. GC, Article 147.

45. GC, Article 4, indicates that "[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals."

46. Jean S. Pictet, ed., Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva: International Committee of the Red Cross, 1958), 81.

47. The pertinent provisions regarding occupation are found in Section III, Occupied Territories, of the GC, specifically, Articles 47 through 78.

48. Department of the Army, The Law of Land Warfare, Field Manual 27-10 (Washington: U.S. Department of the Army, July 1956), para. 355, at 139.

49. U.S. Permanent Mission in Geneva, Diplomatic Note to the International Committee of the Red Cross (Sept, 19, 1994) (on file with Professor Meron), reproduced in Meron, 78.

50. Meron, 78.

51. See Addicott and Hudson for a discussion of the facts of this incident.

52. Article 4 of the GC indicates that "nationals of a co-belligerent State shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." The argument is that since the victims were nationals of South Viet Nam, a co-belligerent of the U.S., they were not protected persons under the Geneva Convention and that as a result, their killings were not "war crimes."

53. 10 U.S.C. §801 et. seq.

54. Amnesty International, USA, Political Violence in Colombia: Myth and Reality, (New York: Amnesty International, USA, 1994).

55. Ibid., 3.

56. Andrew Borowiec, "U.S. Called Partner in Colombian Murders," The Washington Times, 16 March 1994, sec. A, p. A1.

57. See generally, R. Jeffrey Smith and John M. Goshko, "U.S. Had Information in 1991 Tying CIA Informer to Killing," The Washington Post, 24 March 1995, sec. A, p.1; and R. Jeffrey Smith, "CIA Station Chief 'Sat On' Information: Official Failed to Report Informer's Link to Slaying in Guatemala," The Washington Post, 25 March 1995, sec. A, p.1.

58. Ibid.

59. See generally, Office of the Inspector General, Central Intelligence Agency, Report of Investigation, Guatemala: Overview, (Washington: Central Intelligence Agency, July 25, 1995). This report provides an excellent analysis of the entire incident.

60. Monograph, 6.

61. Ibid., 7.

62. Meron, 79 & 80.

63. Ibid., 80.

64. Ibid., 81.

65. Ibid., 82.

66. See Endnote 5.

67. OPLAW Handbook, 13-1.

68. Ibid.

69. Ibid.

70. Ibid., 13-3.

71. Ibid.

72. Ibid., 13-4. In footnote 16 on page 13-4, the fact that the Declaration of Human Rights is not international law requiring state compliance with its provisions is conceded, but it is then referred to as "the universally accepted interpretation and definition of human rights left undefined by the [UN] Charter." The key is that the Declaration is not binding international law. The "numerous human rights treaties" are not specified. This paper has already discussed one human rights treaty that was not applicable to Operation Uphold Democracy. The UN Charter provides little specific guidance. Primarily it encourages member states to take actions to promote human rights. Finally, the limitations of common Article 3 have already been discussed. The fact that it is only applicable to non-international armed conflicts is mentioned in footnote 18 on page 13-4 as is the argument that it protections should be applied more broadly. The Article is only legally-binding during non-international armed conflicts.

73. Ibid.

74. Ibid., 13-5.

75. Ibid., 13-6.

76. General Barry R. McCaffrey, Commander in Chief, U.S. Southern Command, "Policy Memorandum #1-95, Subject: USSOUTHCOM Human Rights Policy," U.S. Southern Command, Quarry Heights, Panama, 16 June 1995 (hereinafter Memo).

77. The speech by General Barry R. McCaffrey, "Role of the Armed Forces in the Protection and Promotion of Military Rights," was directed at members of the armed forces of Latin America and is printed in Volume 3 of Dialogo (1994) at page 7 (in English). The speech has also been converted into an article, "Human Rights and the Commander," printed in The Joint Forces Quarterly, no. 9, Autumn 1995, at page 10.

78. Memo, 1.

79. Ron Lajoie, "A Soldier's Story," Amnesty Action, Amnesty International USA, Summer 1995, p 6.

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